

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 24, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2013AP300**

**Cir. Ct. No. 2011CV3257**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**BRET N. BOGENSCHNEIDER,**

**PLAINTIFF-APPELLANT,**

**V.**

**RICHARD BEAUVAIS, PAMELA VROSS, LIZANNE GOTTUNG,  
MARGARET CURRY AND KIMBERLY-CLARK GLOBAL SALES, LLC,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County:  
JOHN W. MARKSON, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Bret Bogenschneider appeals an order of the circuit court that dismissed on summary judgment his claims for breach of contract, breach of covenant of good faith and fair dealing, tortious interference with contract, injury to business against his former employer, Kimberly-Clark Global

Sales, LLC, and former co-workers, Richard Beauvais, Pamela Vross, Lizanne Gottung and Margaret Curry (collectively, the respondents), and denied his motion to compel discovery. We affirm.

## **BACKGROUND**

¶2 From 2007 until 2010, Bogenschneider was actively employed by Kimberly-Clark as a senior tax attorney. In June 2010, Bogenschneider and Kimberly-Clark entered into a “separation agreement,” which provided that beginning in May 2010, Bogenschneider would be assigned to “special projects” and “released from his regular duties,” but would remain on Kimberly-Clark’s payroll as “non-benefits eligible employee” until May 2012, when his employment relationship with Kimberly-Clark would cease. The separation agreement provided that Kimberly-Clark agreed that “should future potential employers of [] Bogenschneider seek an employment reference from [Kimberly-Clark], they will be directed to [Kimberly-Clark’s] employment verification line, which will reflect that [] Bogenschneider is currently with [Kimberly-Clark] in the position of Senior Tax Attorney until May 7, 2012.” The separation agreement further provided that Kimberly-Clark would “provide [] Bogenschneider with 25 signed originals of a mutually agreeable letter of reference.”

¶3 In July 2011, Bogenschneider brought suit against the respondents for breach of contract, breach of covenant of good faith and fair dealing, tortious interference with contract, and injury to business. Relevant to the present appeal is Bogenschneider’s claim for breach of contract, which stemmed from allegations that: (1) Bogenschneider’s potential employers who sought references from Kimberly-Clark were not directed to an employment verification line confirming his employment with Kimberly-Clark, but were instead informed that

Bogenschneider should not be hired or informed that Bogenschneider was not an employee of Kimberly-Clark; (2) Bogenschneider was not provided twenty-five signed letters of reference; (3) Kimberly-Clark posted an ad for Bogenschneider's former job; (4) reference information and verification of employment information was not provided; and (5) Bogenschneider's employment was not verified to prospective employers. Only the first and second allegations are argued in any depth on appeal.

¶4 In November 2011, the circuit court entered a scheduling order setting June 29, 2012, as the final date for all dispositive motions. On June 25, Bogenschneider moved the court to postpone the deadline for dispositive motions on the basis that he needed additional time to conduct discovery. The respondents objected to Bogenschneider's motion, and they moved the circuit court for summary judgment. In August 2012, the circuit court denied Bogenschneider's motion to postpone the dispositive motion deadline and, after responding to the respondents' motion for summary judgment, Bogenschneider moved the court for an order to compel discovery.

¶5 In October 2012, the circuit court granted the respondents' motion for summary judgment and denied Bogenschneider's motion to compel. Bogenschneider appeals. Additional facts will be discussed below as necessary.

## **DISCUSSION**

¶6 Bogenschneider challenges the circuit court's denial of his motion to compel discovery and the court's entry of summary judgment in favor of the respondents. We address these contentions in turn below.

*A. Motion to Compel Discovery*

¶7 We review the denial of a motion to compel discovery for an erroneous exercise of discretion. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶13, 312 Wis. 2d 1, 754 N.W.2d 439. We will uphold a discretionary decision if the circuit court “examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.” *Id.* Whether the court applied a proper standard of law is an issue reviewed de novo by this court. *Id.* Ultimately, it is the burden of the appellant to show that the court erroneously exercised its discretion in granting or denying a litigant’s motion to compel discovery. *Id.*

¶8 In denying Bogenschneider’s motion to compel, the circuit court reasoned that a timetable had been established which the court found provided Bogenschneider with advance notice to seek relevant discovery materials that may not have been provided in initial discovery requests. The court found that Bogenschneider’s motion to compel “could have and should have been brought up in sufficient time to meet the summary judgment deadlines so that all that was necessary to either support or defend against a motion for summary judgment was there,” but was not. The court acknowledged that it had discretionary authority under WIS. STAT. § 802.08(4) (2011-12) to order a continuance of the respondents’ summary judgment motion in order to permit further discovery or the submission of additional materials. However, the court declined to do so because the case had been pending for more than one year and the deadline for summary judgment motions allowed Bogenschneider “ample time” to conduct discovery and to resolve any discovery disputes. The court then went on to state: “I will also say this. There is absolutely nothing in the discovery that is requested that would in any way indicate that even if [the court] were to permit it, there is any

reasonable chance that anything that would allow [] Bogenschneider to meet his burden of proof.”

¶9 Relying on the quoted statement in the preceding paragraph, Bogenschneider contends that the circuit court erroneously exercised its discretion when it denied his motion to compel discovery because the court applied the wrong legal standard. Bogenschneider argues that the burden lay with Kimberly-Clark to establish a prima facie case for summary judgment. *See Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). However, according to Bogenschneider, the court shifted the burden to him to demonstrate that the information would allow him “to meet his burden of proof” as a prerequisite to obtaining the information he sought to compel. We also read Bogenschneider’s brief as arguing that even if the court did not apply the wrong legal standard, the court wrongly determined that the information sought in the motion to compel was not likely to lead to information that would help him meet his burden on summary judgment.

¶10 Bogenschneider misinterprets the circuit court’s ruling. The court’s decision to deny the respondents’ motion to compel was not premised on the nature of the information Bogenschneider sought to discover, nor was it premised on that information’s likelihood to overcome summary judgment. Instead, the denial of Bogenschneider’s motion to compel was premised on Bogenschneider’s delay in bringing that motion. In commenting on the nature of the information Bogenschneider sought to compel, the court was simply explaining that even if the court had not denied the motion, the ultimate outcome on summary judgment would have remained unchanged.

¶11 Bogenschneider also asserts that the circuit court erroneously exercised its discretion in denying his motion to compel because he waited too long to bring the motion. However, had the court compelled discovery, it would have had to extend the time for the filing of discretionary motions. Bogenschneider does not develop an argument as to why the court's decision not to exercise its discretion and extend the deadline was an erroneous exercise of discretion despite the fact that Bogenschneider had more than one year to conduct discovery and take any necessary actions to obtain any discovery materials from the respondents, but waited until shortly before the summary judgment deadline to do so. Accordingly, we do not further address this issue. *See State v. Pettit*, 171 Wis. 2d 627, 646-67, 492 N.W.2d 633 (Ct. App. 1992) (we need not decide issues that are inadequately briefed).

### *B. Summary Judgment*

¶12 We review summary judgment independently, applying the same standards as the circuit court. *See H & R Block E. Enters., Inc. v. Swenson*, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12). On summary judgment, this court does not decide issues of material fact; rather, it decides whether there are disputes of material fact. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶13 Bogenschneider contends that the circuit court erred in granting the respondents' motion for summary judgment on the issue of whether Kimberly-Clark breached the separation agreement.<sup>1</sup> Bogenschneider argues that from the record before the circuit court on summary judgment, a jury could reasonably infer that Kimberly-Clark breached the separation agreement by failing to direct potential employers seeking an employment reference for him to Kimberly-Clark's employment verification line.

¶14 In support of his challenge to summary judgment, Bogenschneider points out that he applied for numerous jobs and was a top contending candidate for some of those positions, but was never offered a job, and that a lending institution he sought to obtain home financing from was not able to access the employment verification line. Bogenschneider also asserts:

There is strong circumstantial evidence to that end in the form of testimony from [a private investigator hired by Bogenschneider] who simulated an employment reference check on Bogenschneider and never once was directed to an employment verification line. Instead, he ended up with a [Kimberly-Clark] ... staff person who advised she believed Bogenschneider was no longer with [Kimberly-Clark], and later with Beauvais who initially said information about Bogenschneider could not be provided, before engaging [the private investigator] in a protracted conversation which uncomfortably danced around the questions of what kind of work Bogenschneider was doing at [Kimberly-Clark], or even where he was. Then, when [] Vross was informed of the inquiry, she did not remind Beauvais they were contractually bound to direct

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<sup>1</sup> Bogenschneider does not develop an argument that the circuit court erred in granting summary judgment in favor of the respondents on Bogenschneider's remaining claims for breach of covenant of good faith and fair dealing, tortious interference with contract and injury to business, nor does he argue that the court erred in granting summary judgment in favor of Beauvais, Vross and Gottung, on his breach of contract claim. Accordingly, we limit our analysis to the question of whether summary judgment was appropriate on the issue of whether Kimberly-Clark breached its separation agreement with Bogenschneider.

individuals such as [the private investigator] to the employment verification line, but instead, made it clear that she wished to speak personally with prospective employers of Bogenschneider. (Emphasis omitted.)

¶15 Kimberly-Clark argues that the evidence Bogenschneider relies upon is mere speculation that Bogenschneider’s prospective employers were not forwarded to the employment verification line. Kimberly-Clark asserts that Bogenschneider did not provide any evidence that any of his prospective employers contacted Kimberly-Clark or if they did, that they were not directed to the employment verification line. Kimberly-Clark further asserts that the private investigator hired by Bogenschneider did not attempt to reach the employment verification line, but instead attempted to contact respondents Curry and Beauvais directly “and tried to cajole them into saying something that Bogenschneider could use to assert a breach” of contract.

¶16 We are persuaded that Bogenschneider seeks to prove a breach of contract by Kimberly-Clark by piling one inference upon another.

¶17 Circumstantial evidence may establish material facts, *Reichert v. Rex Accessories Co.*, 228 Wis. 425, 439, 279 N.W. 645 (1938), however, such evidence must dispel speculation and doubt. *Rumary v. Livestock Mortgage Credit Corp.*, 234 Wis. 145, 147, 290 N.W. 611 (1940).

¶18 Bogenschneider claims that he applied for employment positions with approximately fifty-five employers; however, Bogenschneider failed to present direct evidence that any of Bogenschneider’s prospective employers actually called Kimberly-Clark. Bogenschneider asks us to infer that because his private investigator and lender were not directed to the employment verification line, his prospective employers were likewise not referred to the employment



verification line, which in turn led to him not receiving any employment offers. However, this line of reasoning would require the building of “an inference upon an inference” and constitutes speculation. *See Home Sav. Bank v. Gertenbach*, 270 Wis. 386, 404, 71 N.W.2d 347 (1955). It does not reasonably follow that simply because Bogenschneider’s private investigator and lender were not referred to the employment verification hotline, Bogenschneider’s prospective employers were also not referred to the verification line. Speculation is an insufficient basis upon which to find a fact; thus, Bogenschneider has failed to demonstrate sufficient facts to support a prima facie claim that Kimberly-Clark breached the separation agreement by failing to refer prospective employers to an employment verification line.

¶19 We also read Bogenschneider’s brief as arguing that from the record before the court, a jury could reasonably infer that Kimberly-Clark breached the employment contract by failing to provide him with twenty-five original letters of reference until approximately one year after the separation agreement was entered into. However, the terms of the separation agreement did not specify *when* Kimberly-Clark was obligated to provide those letters, but just that they be provided. It is undisputed that Kimberly-Clark provided the letters to Bogenschneider upon request. Accordingly, we conclude that a jury could not reasonably infer that Kimberly-Clark breached the separation agreement by failing to provide the letters of reference.

## CONCLUSION

¶20 For the reasons discussed above, we affirm.

*By the Court.*—Order affirmed.

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